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No. 88-348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NEW ORLEANS PUBLIC SERVICE INC.,

Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, et al.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S BRIEF

HERSCHEL L. ABBOTT, JR.
DAVID G. RADLAUER
EDWARD H. BERGIN
R. LEWIS MCHENRY
JONES, WALKER, WAECHTER POITEVENT, CARRERE & DENEGRE
201 St. Charles Avenue
New Orleans, LA 70170
(504) 582-8000

REX E. LEE*
DAVID W. CARPENTER
JAMES A. HUTTENHOWER
MARK A. KERBER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

THOMAS O. LIND
Vice President-Regulatory Counsel
New Orleans Public Service Inc.
317 Baronne Street
New Orleans, LA 70112
(504) 595-2218

Attorneys for Petitioner

Counsel of Record

4908

QUESTION PRESENTED

Whether, under the abstention doctrines of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), or *Younger* v. *Harris*, 401 U.S. 37 (1971), a federal district court may refuse to adjudicate a federal claim that a federal statute (in this case the Federal Power Act) and the explicit orders of a federal agency (here FERC) have preempted local regulatory authorities from making separate and inconsistent determinations of the very matters FERC has decided?

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PETITIONER'S BRIEF[1]

OPINIONS BELOW

The opinion of the Court of Appeals (Cert. App. 1A-20A) is published at 850 F.2d 1069. The opinion of the District Court (Cert. App. 21A-33A) is unpublished.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on July 28, 1988. Cert. App. 1A-20A & 35A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

[1]The Rule 28.1 Statement appears at page ii of the Petition for Certiorari.

STATEMENT OF THE CASE

Introduction

The question presented in this case is whether principles of comity and federalism can bar a federal court from enjoining a local utility proceeding that is preempted in its entirety by a federal statute and that is interfering with interstate commerce in the very ways that Congress sought to prevent by giving a federal agency exclusive jurisdiction over the underlying interstate transactions.

The question arises in a case presenting an immediate need for the exercise of federal equitable jurisdiction. Congress enacted the Federal Power Act because it recognized that wholesale sales of electric power inevitably affect multiple states and that interstate commerce vital to the nation would be threatened unless a neutral federal forum were established to allocate interstate power pool costs among ratepayers in different states and between ratepayers and utility shareholders.

In *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, No. 86-1970, 108 S. Ct. 2428 (June 24, 1988) ("*MP&L*"), this Court held that the very FERC decisions at issue in this case preempt a state from investigating the "prudence" of costs that FERC has ordered local utilities and their ratepayers to incur and that the Federal Power Act requires retail regulatory authorities to treat these costs as "reasonably incurred operating expenses" in setting retail rates.[2] As the Court stated, local regulators "may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates" or otherwise "trap" these expenses. 108 S. Ct. at 2439, slip op. at 16-17; *accord Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 965-66 (1986).

[2] "These principles . . . . compel us to hold that [local regulators] may not enter an order 'trapping' the costs [the local utility] is mandated to pay under the FERC order allocating Grand Gulf power or undertake a 'prudence' review for the purpose of deciding whether to enter such an order." 108 S. Ct. at 2439, slip op. at 17; *see id* at 2438, slip op. at 16.

Here, however, the Council of the City of New Orleans ("Council") has done precisely what *MP&L* and *Nantahala* held to be unlawful: it undertook a prudence review of petitioner's federally mandated Grand Gulf 1 expenses and entered an Order disallowing and "trapping" $135 million of those costs for retail ratemaking purposes. Moreover, the Council has continued to enforce its Order, despite this Court's intervening *MP&L* decision and despite the fact that the Council's *amicus curiae* briefs in *MP&L* unsuccessfully urged that such prudence disallowances are permissible. Thus, the Court of Appeals correctly "assum[ed]" that the Council had no legitimate interest in conducting its prudence investigation; that its Order is "beyond the Council's retail ratemaking authority;" and that a state court, or this Court, will eventually so hold. Cert. App. 11A, 20A. It follows that the sole effect of abstention has been to delay the vindication of explicit federal rights.

However, in the interim, the delays have severely harmed petitioner and the federal policies Congress sought to achieve. To obtain any rate relief at all, petitioner was previously forced to agree to a settlement in which $51 million in Grand Gulf 1 expenses would be absorbed by shareholders, contrary to FERC's determinations. And the Council's Order disallowing and "trapping" an additional $135 million of these expenses has imperiled the financing of petitioner's operations, contrary to the Congressional intent that utilities recover wholesale costs incurred under FERC rate schedules. In short, abstention is immediately harming protected federal interests in a case in which *no* legitimate substantive state interest is being served in the pending state proceedings.

1. Background. This case arises from the same facts and the same FERC orders that were at issue in *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, No. 86-1970, 108 S. Ct. 2428 (June 24, 1988) ("*MP&L*"). Here, as there, a local utility regulator is attempting to use its retail ratemaking authority to circum-

vent the FERC decisions that allocated the costs of Grand Gulf 1 among the operating company subsidiaries of Middle South Utilities, Inc. ("MSU").[3]

Petitioner New Orleans Public Service Inc. ("NOPSI") is one of four MSU electric operating subsidiaries engaged in the retail sale of electricity in separate service areas in Louisiana, Arkansas, Missouri, and Mississippi. The other MSU operating companies are Mississippi Power & Light Company ("MP&L"), Louisiana Power & Light Company ("LP&L"), and Arkansas Power & Light Company ("AP&L"). MSU also owns all the voting stock of an electric generating subsidiary, Middle South Energy, Inc. ("MSE"),[4] which owns Grand Gulf Nuclear Electric Generating Station Unit 1 ("Grand Gulf 1").

NOPSI provides retail electric service in the City of New Orleans. NOPSI's retail rates are regulated by the Council of the City of New Orleans ("Council"), which is an elected body.

[3]FERC initially made the allocations and wholesale rate determinations at issue here in *Middle South Energy, Inc.*, FERC Opinion No. 234, 31 FERC (CCH) ¶ 61,305 (1985) and *Middle South Energy, Inc.*, FERC Opinion No. 234-A, 32 FERC (CCH) ¶ 61,425 (1985). These opinions were reviewed by the United States Court of Appeals for the District of Columbia Circuit in *Mississippi Industries* v. *FERC*, 808 F.2d 1525, *modified on rehearing*, 822 F.2d 1104 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 500 (1987). There, the Court of Appeals affirmed FERC's jurisdictional determinations and its decision on most cost allocation issues but remanded for reconsideration of the decision to equalize nuclear capacity costs. On remand, FERC has issued two opinions reaffirming and further explaining the basis for its previous allocation: *System Energy Resources, Inc.*, FERC Opinion No. 292, 41 FERC (CCH) ¶ 61,238 (1987) and *System Energy Resources, Inc.*, FERC Opinion No. 292-A, 42 FERC (CCH) ¶ 61,091 (1988), *petitions for review pending, City of New Orleans* v. *FERC*, Nos. 88-1067, 88-1068, 88-1124, and 88-1198 (D.C. Cir.). The FERC decisions will be cited as "_____ FERC at _____."

[4]MSE has since been renamed System Energy Resources, Inc. ("SERI"). *See* Cert. App. 3A.

The MSU companies have built or acquired electric generation to meet the needs of the MSU system as a whole, and "[t]hrough MSU the four companies operate as an integrated power pool, with all energy in the entire system being distributed by a single dispatch center." *MP&L*, 108 S. Ct. at 2431, slip op. at 2. The costs of this electricity are allocated among the MSU companies under rate schedules that determine each operating company's costs of acquiring power for resale to its retail customers and that "equaliz[e] cost imbalances among the four companies." *See MP&L*, 108 S. Ct. at 2431, slip op. at 2.

In 1982, before Grand Gulf 1 began operations, the MSU companies filed with FERC a rate schedule (the Unit Power Sales Agreement or "UPSA")[5] that would determine the wholesale rates to be paid for Grand Gulf 1's generation and also allocate its costs and output among the four MSU companies.[6] *See MP&L*, 108 S. Ct. at 2433, slip op. at 5. As originally filed, this rate schedule would have allocated 29.80% of the costs and output of Grand Gulf 1 to NOPSI.

FERC conducted extensive proceedings to determine the "just and reasonable" rates for Grand Gulf 1 power and to prescribe a "just, reasonable, and non-discriminatory" allocation of Grand Gulf 1's costs and output among the four MSU operating companies. The City of New Orleans ("City")[7] and representatives of

[5]In 1982, the MSU companies also filed a new System Agreement, which set forth the terms and conditions for wholesale transactions among the four MSU operating companies and which was "designed to ensure that each company contribute proportionately to the total costs of generating power on the system." *MP&L*, 108 S. Ct. at 2433, slip. op. at 5.

[6]MSU had previously sold a 10% interest in Grand Gulf 1 to the South Mississippi Electric Power Association (SMEPA). *See* 31 FERC at 61,668 n.3. The UPSA and the FERC proceedings dealt with the allocation of the MSU system's share of Grand Gulf 1 among the MSU companies and shareholders. The UPSA and the FERC decisions thus allocated 100% of the MSU system's 90% of Grand Gulf 1.

[7]The City acted at the direction of the Council.

each affected state participated extensively in these FERC proceedings. *See MP&L*, 108 S. Ct. at 2433, slip op. at 5-6; Cert. App. 4A. The representatives of each jurisdiction advanced arguments under which its operating utility would be allocated little or no Grand Gulf 1 output. For example, the City urged that NOPSI be responsible for no more than 9% of Grand Gulf 1.

FERC found that Grand Gulf 1 had been planned, constructed, and completed to meet the needs of the MSU system "as a whole" (*MP&L*, 108 S. Ct. at 2434, slip op. at 7), and FERC established rates that would permit MSE to "recoup 100% of the costs of Grand Gulf in the wholesale rates it charged to the four operating companies." *MP&L*, 108 S. Ct. at 2441, slip op. at 20. Specifically, FERC concluded that "principles of just, reasonable, non-discriminatory, and non-preferential rates" required an allocation of Grand Gulf 1's costs and output in which the four operating companies would "share the cost of the system's investment in nuclear energy in proportion to their relative demand for energy generated by the system as a whole." *MP&L*, 108 S. Ct. at 2435, slip op. at 9.

In so holding, FERC rejected the arguments of local regulators that allocations of Grand Gulf 1 should be based on (1) whether individual companies needed Grand Gulf capacity,[8] (2) representations that operating company officials had made to state and local officials,[9] or (3) the companies' contractual allocations.[10]

[8]*See MP&L*, 108 S. Ct. at 2435, 2441, slip op. at 9, 21; 32 FERC at 61,958; *Mississippi Industries, Inc.* v. *FERC*, 808 F.2d at 1549 n.93.

[9]*See MP&L*, 108 S. Ct. at 2441 n.14, slip op. at 21-22 n.14; 31 FERC at 61,645; *Mississippi Industries, Inc.* v. *FERC*, 808 F.2d at 1550.

[10]*See MP&L*, 108 S. Ct. at 2434, 2435, slip op. at 8, 9; 31 FERC at 61,655; 32 FERC at 61,961; *Mississippi Industries, Inc.* v. *FERC*, 808 F.2d at 1556-57, 1558-60.

FERC thus prescribed substantial changes in the Grand Gulf 1 allocations among the MSU companies:

	UPSA as filed	FERC's Allocation
AP&L	0%	36%
LP&L	38.57%	14%
MP&L	31.63%	33%
NOPSI	29.80%	17%

FERC therefore ordered a reduction in NOPSI's allocation from 29.80% to 17%. At the same time, FERC rejected the City's position that NOPSI should be allocated no more than 9%, holding that such an allocation would not result in "just, reasonable, and nondiscriminatory rates." *32 FERC at 61,959-60.*

The net effect of FERC's Order was that when Grand Gulf 1 went into operation on July 1, 1985, NOPSI was required by FERC to purchase 17% of Grand Gulf 1's capacity and to incur Grand Gulf 1 costs of approximately $15.5 million per month.

2. Prior Proceedings. On May 17, 1985, NOPSI filed an application with the Council for the retail rate increase required to recover these Grand Gulf 1 costs. NOPSI demonstrated that, without a substantial rate increase, it would have soon become insolvent.

When the Council failed to act upon NOPSI's initial application, NOPSI, on August 1, 1985, filed an action in federal district court to enforce its right to recover these FERC-mandated costs. *NOPSI* v. *City of New Orleans*, No. 85-3398 (E.D. La.) ("*NOPSI I*"). NOPSI contended that the Federal Power Act preempts local regulatory authorities from examining the reasonableness of expenses incurred under FERC-mandated rates and that none of these expenses may be disallowed for retail ratemaking purposes.

On September 16, 1985, the District Court dismissed *NOPSI I* under the Johnson Act (28 U.S.C. § 1342) and abstention principles. On February 14, 1986, the Fifth Circuit issued an opinion that reversed on both grounds, and remanded for a determination whether the "filed rate" doctrine required recognition of NOPSI's FERC-mandated Grand Gulf 1 costs. *New Orleans Public Service, Inc.* v. *City of New Orleans*, 782 F.2d 1236 (5th Cir. 1986). However, on September 2, 1986, the Fifth Circuit, on its own motion, reversed itself, and held that the District Court did not abuse its discretion in abstaining. *Id.*, 798 F.2d 858 (5th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987).[11]

After the District Court dismissed *NOPSI I*, the Council, on October 10, 1985, adopted a resolution initiating an investigation into the prudence of NOPSI's involvement in Grand Gulf 1 for the purpose of determining what portion of Grand Gulf 1 expenses should be assumed by shareholders, rather than being passed through to ratepayers. The Council Resolution that instituted the prudence investigation provides that:

> "The Council's investigation shall include inquiry into all aspects of NOPSI's prudence regarding its decisions to enter into its arrangements to purchase a portion of Grand Gulf 1 for the purpose of determining what portion, if any, of NOPSI's Grand Gulf 1 expense shall be assumed by its shareholders, rather than passed through to its retail ratepayers." Resolution No. R-85-636; *see* J.A. 16.

On November 14, 1985, NOPSI brought a parallel case to enjoin the Council's prudence investigation. *NOPSI* v. *Council of New Orleans*, No. 85-5273 (E.D. La.) ("*NOPSI II*"). *NOPSI II* was dismissed by the district court on grounds of abstention and ripeness. In defending that judgment on appeal, the Council stated that it *would* fully recognize the FERC-mandated Grand Gulf 1 expenses in setting retail rates. Notwithstanding the language

[11]The Fifth Circuit did not disturb its holding that the Johnson Act did not deprive the District Court of jurisdiction.

of its ordinance initiating the inquiry, the Council stated that its prudence investigation would deal solely with whether it could find savings in other areas of NOPSI's operation that would partially offset the rate increases required to recover NOPSI's Grand Gulf 1 expenses. *See New Orleans Public Service, Inc.* v. *Council of New Orleans*, 833 F.2d 583, 586 (5th Cir. 1987). This representation led the Fifth Circuit to hold that the underlying Federal Power Act claim was not ripe, and to decline to reach the question whether *NOPSI II* was properly dismissed under abstention principles. *Id.* at 588.

In March, 1986, while *NOPSI I* was pending on appeal, NOPSI and the Council entered into a partial "settlement." It provided that shareholders would absorb $51 million of the Grand Gulf 1 expenses, and authorized rate increases in which NOPSI could, on a phased-in basis, ultimately recover the rest of its Grand Gulf 1 expenses. This settlement is embodied in a Council Resolution that determined NOPSI's non-Grand Gulf retail revenue requirements and all rate design issues. Resolution No. R-86-112 (March 20, 1986); *see* J.A. 20-21.

However, in the settlement, the Council reserved its alleged right to continue the ongoing prudence investigation and to order adjustments in NOPSI's rates on the basis of that investigation. NOPSI, in turn, reserved its right to pursue its claim that the Council is preempted from conducting the prudence inquiry and from ordering the disallowance of any additional Grand Gulf 1 expenses.

3. The Council's $135 Million Disallowance. On February 4, 1988, the Council entered an Order that violated its representation to the Fifth Circuit in *NOPSI II*.[12] This Order disallowed $135 million of NOPSI's previously incurred Grand Gulf 1 ex-

[12]The Council's Order was issued at its first regularly scheduled meeting after the Fifth Circuit's mandate issued in *NOPSI II*. The Order apparently had been written by October of 1987, but the Council withheld its decision until *NOPSI II* was final.

penses on grounds of management "imprudence." *See* J.A. 10-250. This $135 million disallowance would produce a total loss to NOPSI of approximately $300 million (including carrying costs of $165 million). R. 18 Ex. 2, p. 7.

To implement this prudence disallowance, the Council ordered reductions in NOPSI's future retail rate increases authorized by the March, 1986 settlement. Specifically, the Council ordered reductions of approximately $500,000 per month in 1988, of $1 million per month in 1989, of $1.5 million per month in 1990, and of an additional $500,000 per month in each succeeding year through 1995. This $135 million of "trapped costs" is in addition to the $51 million that NOPSI previously agreed to absorb in the March, 1986 Settlement with the Council.

Although other findings were made,[13] the Council's $135 million disallowance ultimately rests on its findings that the Grand Gulf 1 power was "excessively priced or uneconomic for other reasons"[14] and that "prudent" NOPSI management thus should

[13]The Council relied on two other findings that are squarely foreclosed by FERC's decisions. First, the Council found that NOPSI's management had been ignorant of important events that affected NOPSI's Grand Gulf 1 commitment at the same time NOPSI's management publicly portrayed this plant as a great benefit to ratepayers. J.A. 24, 161-62. The Council's Order makes no attempt to square this finding with FERC's findings that Grand Gulf 1 was constructed and completed to serve the system as a whole, and that conditions affecting any one operating company were irrelevant. *Compare id. with* 31 FERC at 61,645; *see MP&L*, 108 S. Ct. at 2434, 2441, slip op. at 7, 21.

Second, the Council found that it was imprudent for NOPSI to agree to 29.60% of Grand Gulf 1 in 1982, and should have, instead, taken steps to reduce its exposure in the wake of the 1979 Three Mile Island accident. J.A. 24-25. The Council made no attempt to square this finding with FERC's holding that the agreed-upon allocations were irrelevant and that the Federal Power Act required that NOPSI be responsible for a share of the system's nuclear investment proportionate to its share of system-wide demand. *Compare id. with* 31 FERC at 61,633, 61,655; *see MP&L*, 108 S. Ct. at 2433 n.7, slip op. at 6 n.7.

[14]*See* Brief of Council of City of New Orleans, et al. In Opposition To Petition, p. 8 n.5 (filed Sept. 26, 1988) ("Council Cert. Opp.").

have entered into contracts in 1979-80 to sell "that portion of [NOPSI's] commitment which exceeded a 9 percent share of Grand Gulf" and to buy equivalent amounts of coal-fired capacity at hypothetically lower rates. J.A. 25.

In the Council's view, NOPSI today should be: (1) buying 17% of Grand Gulf 1's capacity at the "excessive" rate set by FERC; (2) selling 8% of that "excessively priced" Grand Gulf output to some extraordinarily generous or naive third parties who would pay that *same* "uneconomic" FERC rate; and (3) acquiring the equivalent of 8% of Grand Gulf 1's output at the hypothetical (lower) cost of alternative coal-fired generation. *See* J.A. 11-12, 161-73. As the District Court found, the Council nowhere explains how prudent management could find a "sucker" to buy "excessively priced" Grand Gulf 1 capacity when the same quantities of power could be purchased at lower prices through open market purchases. Cert. App. 30A. Nor does the Council explain how NOPSI could have entered into the hypothetical off-system contracts in 1979-80 when neither the price[15] of Grand Gulf 1 power nor the amount of NOPSI's allocation[16] would be determined by FERC until 1985, five or six years later.[17]

[15]The premise of the Council's Order is that no other utility knew that the price of Grand Gulf 1 would be "excessive" or "otherwise uneconomic" in 1980. The Council nowhere explains how another utility could have bound itself in 1980 to make future wholesale purchases of power at whatever price would be determined five years later, no matter how "excessive."

[16]In 1979-80, NOPSI's allocation could have theoretically ranged from the 9% urged by the Council to amounts in excess of the 29.70% to which NOPSI had agreed in the UPSA. Thus, even if NOPSI could have then contractually limited its Grand Gulf 1 commitment to 9% by making off-system sales and purchases, NOPSI could not have known how much Grand Gulf 1 power it would have had to sell or how much substitute coal-fired capacity it would have had to buy. The experience of AP&L is instructive. In 1980, it contracted for a Grand Gulf 1 share of 0%. In 1985, FERC changed that share to 36%.

[17]The Council has extensively relied on the fact that NOPSI's President testified in 1980 that "*if*" and when the Council disapproved NOPSI's participation in Grand Gulf 1, "*then* NOPSI has the option of

(Footnote continued on following page)

Further, the Council's finding that NOPSI could have and should have used off-system sales and purchases to avoid Grand Gulf 1 costs not only determines matters within FERC's exclusive jurisdiction, but also is contrary to FERC's own determinations in FERC Opinions 234 and 234-A. The Council's finding that "prudent" NOPSI management should have avoided FERC's allocation rests on the premise that the allocation was unreasonable. That is contrary to FERC's determinations. *See* ***MP&L***, 108 S. Ct. at 2434, slip op. at 8. Further, even if NOPSI had entered into the hypothetical off-system transactions in 1980, those contracts were themselves wholesale transactions that would not be approved unless they were found "just, reasonable, and nondiscriminatory" by FERC. In all events, FERC has exclusive jurisdiction to determine how the hypothetical 1980 contracts would affect NOPSI's Grand Gulf 1 allocation, and the findings and methodology in FERC's subsequent 1985 decisions foreclose any claim that the hypothetical 1980 sales could have reduced NOPSI's wholesale power costs by $135 million.[18]

(Footnote continued from previous page)

selling the capacity and marketing it . . . to other electric utilities." *See* J.A. 102; Council Cert. Opp. p. 5-6 (emphasis added). In now relying upon this statement, the Council ignores that (1) the Council did not disapprove NOPSI's participation in 1980, (2) neither the price nor quantity of Grand Gulf 1 power had been determined in 1980, and (3) any wholesale sales by NOPSI, and the question of how such sales would affect NOPSI's Grand Gulf allocation and its overall purchased power expenses, were themselves committed to FERC's exclusive jurisdiction. Finally, the Council ignores that this Court held in ***MP&L*** that representations made in state utility proceedings have "no relevance to the preemption question" presented by FERC's Grand Gulf 1 allocation. ***MP&L***, 108 S. Ct. at 2441 n.14, slip op. at 22 n.14.

[18]FERC's 1985 decision allocated MSU's 90% share of Grand Gulf 1 among the four MSU operating companies to equalize nuclear investment costs in proportion to each company's share of system demand. *See* pp. 5-6 & n.6, *supra*. In ordering this allocation, FERC held that contracts entered into by individual MSU companies in 1980 were irrelevant and could not alter the allocation dictated by FERC's ratemaking

(Footnote continued on next page)

In the *amicus curiae* briefs that the Council filed in this Court in the ***MP&L*** case, the Council presented its theory that Grand Gulf 1 costs can lawfully be disallowed on the ground that it was imprudent not to make off-system sales. The Council further contended that the Court could not reverse the Mississippi Supreme Court's decision unless it held that such a Grand Gulf 1 "prudence" disallowance is also preempted by federal law.[19]

4. This Suit. On February 9, 1988, NOPSI filed this suit in federal district court to obtain declaratory and injunctive relief from the Council's Order. NOPSI's claim is that the Federal Power Act and the Commerce Clause preempt the Council's jurisdiction to investigate the prudence of FERC-mandated costs and require that those costs be treated as reasonable operating expenses in setting retail rates. No state law issue was raised, and the complaint rests solely on these federal grounds. *See* R. 1. NOPSI demonstrated that it would suffer irreparable harm

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principles. *See* 31 FERC at 61,655; 32 FERC at 61,961. Under FERC's methodology, any off-system sales would have reduced the MSU system's total nuclear costs, and the benefits of such cost reductions would have been proportionately allocated among the operating companies in order to fulfill FERC's stated goal of equalizing nuclear unit investment costs.

Thus, if NOPSI could have sold 8% of Grand Gulf 1 off-system in 1980, FERC's methodology would have dictated that this off-system sale, too, be regarded as benefitting the system as a whole, and that NOPSI continue to receive a 17% allocation of MSU's share of Grand Gulf 1 (which would have been reduced from 90% to 82%). Under FERC's methodology, therefore, the net effect to NOPSI of an 8% off-system sale would have been a 1.36% reduction (17% of 8%) in its Grand Gulf 1 costs. In contrast, under FERC's methodology, the only way NOPSI could have reduced its Grand Gulf 1 allocation to the 9% assumed by the Council would have been by selling not 9% of Grand Gulf 1, but 53% (9% = 17% of 53%)—which, of course, NOPSI could not do.

[19]Brief of Council of City of New Orleans As Amicus Curiae, *Mississippi Power & Light Co.* v. *Mississippi*, No. 86-1970, p. 10 (filed January 22, 1988); Brief of Council of City of New Orleans As Amicus Curiae, *Mississippi Power & Light Co.* v. *Mississippi*, No. 86-1970, pp. 13-15 & n.10 (filed August 10, 1987).

so long as the Council's Order remained in effect, and NOPSI sought preliminary as well as permanent injunctive relief. *See* R. 2, R. 15, R. 17, & R. 18; Cert. App. 9A.

Without holding a hearing on NOPSI's motion for a preliminary injunction, the District Court dismissed the case on March 10, 1988 on grounds of abstention. Cert. App. 21A-33A. The District Court then remanded two other suits to state court.[20] The District Court stated that it was "mystified" by the Council's Order, which "fault[ed] NOPSI not for buying a 'pig in a poke' but for failing to find a sucker to buy it when the faux-pas became apparent." Cert. App. 30A & n.11. The District Court further observed that the Council "pulled from thin air a figure of 8% for the prudence disallowance" when "the Council, and in this case, everyone else knows" that the Council was just collaterally attacking FERC's rejection of the 9% allocation the Council proposed in the FERC proceeding. The District Court further observed that the 8% "bear[s] no apparent relationship to [any] savings" that were "possible in an actual economic market." However, the District Court stated that "[t]hese questions must be resolved on another day in another court." Cert. App. 30A n.11.

Because of the uncertainty over the availability of a federal forum (*see* Cert. App. 10A), NOPSI had no choice but to file a

[20]Simultaneously with the issuance of the Council's order on February 4, 1988, both the Council and a consumer organization filed lawsuits in state court. Both suits were filed within minutes of the Council's vote and before the Council meeting adjourned. The Council's suit sought a declaratory judgment that the Council's Order was lawful and that NOPSI must comply with it. *Boissiere* v. *Cain* , No. 88-2503 (Civ. Dist. Ct. Parish of Orleans, La., filed Feb. 4, 1988). The consumer organization's suit claimed that the Council should have disallowed all, or far more, of the Grand Gulf 1 costs. *Alliance For Affordable Energy, Inc.* v. *Council of New Orleans*, No. 88-2502 (Civ. Dist. Ct. Parish of Orleans, La., filed Feb. 4, 1988). NOPSI removed both suits to federal district court where they were consolidated with the instant suit. *See* Cert. App. 27A n.6. The district court remanded both suits to state court in light of its abstention holding.

petition to review the Council's Order in the Civil District Court for the Parish of Orleans, Louisiana. NOPSI did so on March 7, 1988, the last day to file an appeal under the applicable limitations period. *NOPSI* v. *Council of New Orleans*, No. 88-4511 (Civ. Dist. Ct. Parish of Orleans, La.). As filed, NOPSI's petition for review raised only state law and federal Due Process Clause claims, but NOPSI told the state court that it would attempt to raise the federal preemption and Commerce Clause claims in the state suit only if the federal court subsequently dismissed NOPSI's federal complaint.[21] When the District Court did so, NOPSI amended its state complaint to include a federal preemption claim, and NOPSI filed a motion for preliminary injunction on federal preemption grounds, which the state court denied on May 5, 1988.[22]

After this Court decided *MP&L* on June 24, 1988, NOPSI abandoned all the claims raised in the state complaint other than its federal preemption claim and a challenge to the sufficiency of the evidence to support the disallowance.[23] Thus, if and when the state court decides the case on the merits,[24] the only ground

[21]*See* NOPSI's Petition for Review, *NOPSI* v. *Council of New Orleans*, No. 88-4511 (Civ. Dist. Ct. Parish of Orleans, La.), p. 3 ¶ 9 (filed March 7, 1988).

[22]NOPSI appealed this order denying a preliminary injunction to the intermediate Louisiana appellate court (the Court of Appeal) which twice denied requests to expedite the appeal. On February 16, 1989, the Court of Appeal affirmed the denial of the preliminary injunction solely on state procedural grounds, and the court stated that it "express[es] no opinion" on whether the Council's order "crosses over into an area of exclusive federal regulation." *NOPSI* v. *Council of New Orleans*, No. 88-CA-1369, slip op. at 4 (4th Cir. La. Ct. App.).

[23]NOPSI's Memorandum in Support of Petition for Review, *NOPSI* v. *Council of New Orleans*, No. 88-4511 (Civ. Dist. Ct. of Parish of Orleans, La.), p. 3 (filed Aug. 8, 1988).

[24]The parties to the state trial court proceeding have filed cross motions for judgment on the merits. Oral argument on these motions was held on November 30, 1988, but the parties will hereafter file post-argument briefs.

that would finally dispose of the Council's Order is the federal preemption claim that is the basis for this case. In contrast, any state court decision based on sufficiency of the evidence would require a remand to the Council, which could then renew its prudence inquiry.

5. The Court of Appeals Decision. The United States Court of Appeals for the Fifth Circuit affirmed the District Court's decision to abstain. Although the Fifth Circuit recognized that its decision conflicted with those of other courts of appeals, it held that it was bound by its earlier decision in *NOPSI I*. Cert. App. 17A-20A.

NOPSI I held that abstention was proper under *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). *NOPSI I* recognized that "no state law issue seems relevant" to this case and that there was no risk that federal court intervention would result in inconsistent state and federal court decisions on questions of state law. Nevertheless, it held that "[t]he motivating force behind *Burford* abstention is not the desire to avoid a state law question, but rather, a reluctance to intrude into state proceedings where there exists a complex state regulatory system" and where the state administrative and judicial system affords "adequate" opportunities to raise federal claims. *NOPSI I*, 798 F.2d at 861, 862.

NOPSI I also held that these same considerations established that this case met the conditions for abstention under *Younger* v. *Harris*, 401 U.S. 37 (1971). First, *NOPSI I* held that "the administrative proceeding before the Council constitutes an ongoing judicial proceeding" because it is " 'within the appellate jurisdiction' of the Louisiana courts." *NOPSI I*, 798 F.2d at 864. Second, *NOPSI I* found that NOPSI "would have a full and fair opportunity to litigate its federal claims" in state court. *Id*. Third, *NOPSI I* held that federal court relief would affect legitimate state functions because "[t]he interest of the Council of New Orleans in setting retail rates is clearly important." *Id*.

In the present case, the Fifth Circuit acknowledged that the language in the Court's decision in *MP&L* "seem[ed] to foreclose" the Council's prudence investigation and its Order disallowing $135 million in Grand Gulf 1 expenses. Cert. App. 13A. Indeed, the Fifth Circuit assumed that the Council's prudence investigation is " 'beyond the Council's retail ratemaking authority and violates federal law' "; that "the Rate Order results in 'trapping' FERC allocated costs in violation of federal law"; and that "the Rate Order itself demonstrates that the disallowance of rate increases was based on factors that the state could not legally consider." Cert. App. 11A. It nevertheless held that, under the law of the Fifth Circuit, NOPSI could not challenge the legitimacy of the state prudence proceeding in federal court, but "must seek relief" in the state proceedings themselves. Cert. App. 20A.

SUMMARY OF ARGUMENT

The Fifth Circuit has held that the mere pendency of a state proceeding warrants abstention by a federal court even when it must be assumed that the state has no legitimate substantive interest in conducting the proceeding because state jurisdiction is preempted by a federal statute. This holding conflicts with four decades of decisions of this Court.

The Fifth Circuit's rule rests on a misapprehension of both *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), and *Younger* v. *Harris*, 401 U.S. 37 (1971). Abstention cannot be ordered under either line of decisions unless a federal court first determines that pending state proceedings implicate legitimate state substantive interests and are not preempted by federal law.

Burford. This Court's decisions squarely reject the Fifth Circuit's holding that *Burford* abstention can be ordered when there is "no state law issue" and no risk that federal court adjudication would disrupt a state's efforts to assure consistency in regulatory matters in which the state has a legitimate interest. That was the whole basis for *Burford*, and this Court has repeatedly held that

Burford abstention is improper unless "federal review . . . would be disruptive of state efforts to establish a coherent [state] policy with respect to a matter of substantial public concern" and would be unlikely to advance any substantial federal interest. *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 814 (1976). In contrast, federal claimants may not be remitted to state remedies when, as here, the claimed rights are federal and are not "in any way entangled in a skein of state law that must be untangled before the federal case can proceed." *McNeese* v. *Board of Education*, 373 U.S. 668, 674 (1963); *see Zablocki* v. *Redhail*, 434 U.S. 374, 380 n.5 (1978).

Accordingly, in the same year and same term that *Burford* was decided, this Court held that principles of comity and federalism cannot prevent a federal district court from enjoining a pending state utility proceeding that is preempted in its entirety by the very federal statutory scheme at issue here. *Public Utility Comm'n of Ohio* v. *United Fuel Gas Co.*, 317 U.S. 456, 467-69 (1943) (Natural Gas Act). Federal claimants cannot be relegated to state remedies when, as here, "the only question is whether it is constitutional to fasten the administrative procedure onto the litigant." *Public Utilities Comm'n of California* v. *United States*, 355 U.S. 534, 539-40 (1958).

Younger. The same considerations foreclose abstention under *Younger*. *Younger*, too, rests on a "balancing" in which both "federal and state interests ha[ve] to be taken into account" (*Trainor* v. *Hernandez*, 431 U.S. 434, 438 (1977) (Blackmun, J., concurring)), and all members of the Court have made it clear that abstention is improper where the only state interest in the pending proceeding is to *adjudicate* a federal claim. *See, e.g.*, *Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. 1, 14 n.12 (1987); *id.* at 19-20 (Brennan, J., and Marshall, J., concurring); *id.* at 27-28 (Blackmun, J., concurring); *id.* 30 n.2 (Stevens, J., concurring). *Younger* abstention cannot be ordered unless the court first independently determines that the pending proceeding implicates

"legitimate" and "important" state substantive interests. *See, e.g.*, *Trainor* v. *Hernandez*, 431 U.S. at 441; *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 432 (1987); *Younger*, 401 U.S. at 44.

Younger abstention thus cannot apply to claims that federal law ousts the state of jurisdiction to conduct the pending proceeding. A federal court cannot abstain under *Younger* without first deciding that the putative state substantive interest is "legitimate:" that is, one that has not been preempted. *See Knudsen Corp.* v. *Nevada State Dairy Comm'n*, 676 F.2d 374, 377 (9th Cir. 1982). That is precisely what this Court did in *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619, 628 (1986); it abstained only after deciding that federal law did not preempt the state from exercising jurisdiction over the controversy. Thus, virtually every other court of appeals to consider the question has held that the "legitimate state interest contemplated by *Younger* . . . does not exist when the state action has been preempted" by a federal statute. *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n*, 772 F.2d 404, 417 (8th Cir. 1985).

Finally, respondents concede that *Younger* abstention is improper when the state utility order is invalid on its face. That is the case here because the Council has conducted a prudence review for the very purpose that this Court held to be unlawful in *MP&L*: the disallowance and "trapping" of the Grand Gulf 1 costs that FERC has ordered NOPSI to incur. *MP&L*, 108 S. Ct. at 2438, slip op. at 15.

ARGUMENT

Burford and *Younger* are each applications of principles of comity and federalism that have governed federal equity practice for two centuries: "federal courts should be wary of interrupting the proceedings of state administrative [and judicial] tribunals by use of the extraordinary writ of injunction" and should do so only

to protect overriding federal interests. *Public Utility Comm'n of Ohio* v. *United Fuel Gas Co.*, 317 U.S. 456, 468-69 (1943). The Fifth Circuit's rule constitutes a major extension of these abstention principles.

The Fifth Circuit has held that the mere pendency of state proceedings warrants abstention by a federal court even when it must be assumed that the state has no legitimate substantive interest in conducting the pending proceedings because the state jurisdiction is preempted by a federal statute. The Fifth Circuit so held, moreover, in a case in which the state order is irreparably harming the federal interests that Congress sought to protect, in which there is no state law issue, and in which the state's only interest is an adjudicatory one: deciding an already-settled federal law issue in state tribunals.

However, this Court has repeatedly held that a federal court has no "judicial discretion to dismiss a suit merely because a State court could entertain it." *Alabama Pub. Serv. Comm'n* v. *Southern Ry. Co.*, 341 U.S. 341, 361 (1951) (Frankfurter, J., concurring); *accord Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. 1, 14 n.12 (1987). "Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 813 (1976). Federal district courts have an "unflagging obligation" to exercise their jurisdiction to vindicate federal rights and to protect federal interests (*id.* at 817), and a federal court can abstain from "adjudicat[ing] a controversy properly before it . . . only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959).

Four decades of decisions of this Court establish that such an interest cannot exist unless the pending state proceeding promotes a legitimate and important state substantive interest. Thus, this Court has rejected arguments that considerations of comity

and federalism can foreclose federal equitable relief in cases challenging state utility commission proceedings or orders that interfere with the very federal statutory scheme at issue here.[25] And with good reason. In contrast to *Burford* and *Younger*, the only laws and the only courts whose interests are at stake in this case are those of the federal government, and the "balance" between state and federal interests is clear. Indeed, this Court has held that the issue in such preemption cases is "essentially one of federal policy" and that " 'federal courts are particularly appropriate bodies for the application of preemption principles.' "[26]

I. There Is No Basis For Abstention Under *Burford*.

The Fifth Circuit's abstention holding rests primarily on this Court's decision in *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). The Fifth Circuit recognized that there is "no state law issue that seems relevant" to the case, *NOPSI I*, 798 F.2d at 861, and that a federal court's adjudication of NOPSI's federal preemption claim would not disrupt the state efforts to assure consistency in state law. However, the Fifth Circuit concluded that "the motivating force behind *Burford* is not the desire to avoid a state law question, but rather, a reluctance to intrude into state regulatory proceedings where there exists a complex state regulatory system" that involves matters of "local concern." *Id.* at 862. In this circumstance, the Fifth Circuit held that federal courts can and should abstain from deciding federal preemption claims—and

[25] *Public Utilities Comm'n of Ohio* v. *United Fuel Gas Co.*, 317 U.S. 456, 468-69 (1943) (Natural Gas Act). This Court has stated many times that the "relevant provisions of [the Natural Gas Act and the Federal Power Act] 'are in all material respects substantially identical' " and that it is the Court's "established practice" to "cit[e] interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981) (citations omitted).

[26] *Hagens* v. *Lavine*, 415 U.S. 528, 550 (1974) (citations omitted); *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729 (1966); *see also Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965).

remit the federal claimant to its state administrative and judicial remedies—so long as there is an adequate opportunity to raise the federal claim in the state proceeding itself.

The Fifth Circuit's reasoning has been repeatedly rejected by this Court's decisions. They establish that abstention cannot be ordered under *Burford* unless a case presents "difficult questions of state law bearing on policy problems of substantial public import" and unless "federal review . . . would be disruptive of state efforts to establish a coherent [state] policy with respect to a matter of substantial public concern," without advancing any substantial federal interest. *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 814 (1976).

That was the case in *Burford*. It involved a challenge to an order entered under an exceedingly complex scheme of state oil conservation. Under the state system, the Texas Railroad Commission regulated the spacing of wells in an oil field to assure that a surface owner could not drain away the oil under adjacent parcels (or the entire field), but could remove the equivalent of the amount of the oil under his land. Because the state oil conservation law standards were amorphous and complex, Texas had established a specialized court to review the determinations of the Texas Railroad Commission, to prevent inconsistencies in the interpretation of state standards, and to assure that each oil field was "regulated as a unit for conservation purposes." *Burford*, 319 U.S. at 319.

In ordering abstention, this Court pointed out that "[t]he federal government . . . has chosen to leave the principal regulatory responsibility with the States" (*id.*) and that the plaintiff was simply claiming that this legitimate state authority had been exercised unreasonably in violation of state law and also the Due Process Clause of the Fourteenth Amendment. *See id.* at 317, 331 n.28. This Court found that the determination of the state law issue would be dispositive of nearly all such cases. *Id.* at 331.

Accordingly, the Court reasoned that the only consequence of permitting a multiplicity of federal district courts to decide such cases would be to create conflicts in the interpretation of state law and undermine the exercise of legitimate state authority in an area in which uniformity in state law was critical, and in which the federal interest was minimal. *Id.* at 329-34.

The only other decision of this Court that has permitted abstention on this ground is *Alabama Public Service Comm'n* v. *Southern Railway Co.*, 341 U.S. 341 (1951). There, a federal plaintiff challenged the public service commission order prohibiting discontinuance of intrastate railroad passenger service on the ground that the order was unreasonable, and thus violated both the state statute and the Due Process Clause of the Fourteenth Amendment. In *Alabama Public Service Commission*, as in *Burford*, the state had concentrated judicial review of commission orders in a particular branch of its court system. *Id.* at 348-49. As in *Burford*, the Court concluded that review of the administrative order would be based on predominantly local factors and that intervention by a federal court would disrupt the state's efforts to develop uniform criteria. *Id.*

In contrast, the Court has repeatedly held *Burford* abstention improper when, as here, the federal court challenge to state administrative activity raises only federal claims. For example, in *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), the Court refused to relegate the federal claimants to their state remedies because the claimed rights were federal in origin and were not "in any way entangled in a skein of state law that must be untangled before the federal case can proceed." *Id.* at 674. And the Court has also flatly rejected the Fifth Circuit's suggestion that the fact that the proceeding raises "local concerns" can justify abstention when there is a substantial claim that the state order violates federal law. "[T]here is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." *Zablocki* v. *Redhail*, 434 U.S.

374, 380 n.5 (1978). The "importance to the State of its own law is not material when there is a conflict with a valid federal law." *Brown* v. *Hotel Employees*, 468 U.S. 491, 503 (1984) (citation omitted); *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) (citations omitted).

Indeed, in the same term and same year in which *Burford* was decided, the Court held that principles of comity and federalism cannot prevent federal courts from adjudicating preemption claims indistinguishable from the claim NOPSI has made. In *Public Utilities Comm'n of Ohio* v. *United Fuel Gas Co.*, 317 U.S. 456 (1943), the Court upheld a federal court injunction against a state utility commission's pending investigation of the "just and reasonable" rate that a retail operating company paid for gas purchased from a wholesale supplier. The Court recognized that the state commission's investigation was related to the setting of retail rates and that "federal courts should be wary of interrupting the proceedings of state administrative tribunals by use of the extraordinary writ of injunction." *Id.* at 468-69. However, the Court held that remitting the federal plaintiff to its state remedies would defeat the overriding federal interests. It reasoned that "the orders of the state commission are on their face plainly invalid" because the Natural Gas Act gave FERC's predecessor (the Federal Power Commission) exclusive jurisdiction to determine just and reasonable wholesale rates. The Court held that an injunction was required because the state proceedings would "provok[e] needless, wasteful litigation," require needless expenditures by the utility, and "would work injury" to the interests Congress sought to "safeguard by enacting the Natural Gas Act." *Id.* at 467-469.

Subsequent decisions of this Court have thus uniformly upheld federal district court injunctions of state utility proceedings or orders that are preempted by federal law. *Public Utilities Comm'n of California* v. *United States*, 355 U.S. 534 (1958); *see also City of Chicago* v. *Atchison, T. & S.F. Ry. Co.*, 357 U.S. 77 (1958).

These decisions establish that a federal claimant cannot be remitted to its state remedies when, as here, "the only question is whether it is constitutional to fasten the administrative procedure onto the litigant." *Public Utilities Comm'n of California*, 355 U.S. at 540.

Indeed, because *Burford* abstention cannot be appropriate unless federal court jurisdiction would disrupt *legitimate* efforts by a state to establish coherent policies, the Ninth Circuit has held that "*Burford* abstention is particularly inappropriate when the plaintiff's claim is based on preemption, because abstaining under *Burford* would be an implicit ruling on the merits." *Knudsen Corp.* v. *Nevada State Dairy Comm'n*, 676 F.2d 374, 377 (9th Cir. 1983).

For these reasons, the overwhelming majority of courts of appeals to address the question have held that *Burford* cannot apply to bar federal court adjudication of a substantial federal preemption claim. As the Ninth Circuit has held:

> "The purpose of *Burford* abstention is to avoid federal intrusion into matters which are largely of local concern and which are within the special competence of local courts. A preemption claim alleges in essence that Congress has determined that particular matters are of national concern and should be administered by national, rather than local, institutions. If a preemption claim is well-founded, therefore, *Burford* abstention cannot be appropriate."

International Bhd. of Electrical Workers v. *Public Service Comm'n*, 614 F.2d 206, 212 n.1 (9th Cir. 1980); *accord Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n*, 791 F.2d 1111, 1115-16 (3d Cir. 1986); *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n*, 772 F.2d 404, 417 (8th Cir. 1985); *Baggett* v. *Department of Professional Regulation*, 717 F.2d 521, 524 (11th Cir. 1983).[27] As Judge Friendly stated, "abstention

[27] *But see Aluminum Company of America* v. *Utilities Comm'n of North Carolina*, 713 F.2d 1024 (4th Cir. 1983) (upholding *Burford* abstention in face of preemption claim); *American Electric Power Co.* v. *Kentucky Public Service Comm'n*, 787 F.2d 588 (6th Cir. 1986) (same).

is peculiarly inappropriate when the federal claim is that the state has been ousted from jurisdiction" by a federal statute, for "such difficulties in statutory construction as exist pertain rather to the relevant federal laws, and a federal court is better equipped to deal with these" than is a state tribunal. *Chemical Specialty Mfgs Ass'n, Inc.* v. *Lowery* , 452 F.2d 431, 433 (2d Cir. 1971); *see also Hagens* v. *Lavine*, 415 U.S. 528, 550 (1974); p. 21 n. 26, *supra*.

Against this background, the Fifth Circuit manifestly erred in abstaining under *Burford*. The sole issue in this case is not only a federal preemption claim that federal courts are uniquely equipped to decide, but also a claim that this Court has repeatedly upheld. *See MP&L*, 108 S.Ct 2428 (June 24, 1988); *Nantahala Power & Light* v. *Thornburg*, 476 U.S. 953 (1986); *see also Public Utilities Comm'n of Ohio* v. *United Fuel Gas Co.*, 317 U.S. 456 (1943). Adjudication of this claim by a federal court could not disrupt state interests in establishing uniform standards.[28] To the contrary, it is the decision to abstain that has here disrupted a regulatory scheme designed to promote uniformity.[29]

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[28]Indeed, even if there were a state law issue in the case, there would still be no basis for abstention under *Burford*. A precondition to any finding that federal court review could produce inconsistent interpretations of state law is that review of regulatory orders be concentrated in a specialized court. The Civil District Court for the Parish of Orleans has jurisdiction over appeals of Council rate orders simply because both NOPSI and the Council are within the territorial jurisdiction of that court. However, under Louisiana law, most Louisiana utilities are regulated by the Louisiana Public Service Commission (LPSC), and its orders are reviewed by the district court in Baton Rouge, where the LPSC sits. *See* La. Rev. Stat. Ann. ch. 45, § 1192 (West 1982). The LPSC has no authority to regulate a utility, like NOPSI, that is regulated by the governing authority of a political subdivision. La. Const. art. 4, § 21(C) (West 1977).

[29]*See Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983); *FPC* v. *Southern California Edison & Electric Co.*, 273 U.S. 83 (1964).

Here, as in *United Fuel Gas*, the Council's proceeding has produced the very "multiple litigation" and additional expenditures Congress sought to prevent by centralizing regulation of interstate wholesale energy transactions in FERC. *See Public Utilities Comm'n of Ohio* v. *United Fuel Gas Co.*, 317 U.S. at 469. But the Council has interfered with FERC's regulation far more severely than did the state utility commission order enjoined in *United Fuel Gas*. After the Council initially refused to recognize any of NOPSI's FERC-mandated Grand Gulf 1 expenses, the Council extracted a "settlement" agreement that permanently "trapped" $51 million in federally mandated costs, contrary to *MP&L*, *Nantahala*, and the Congressional purpose of promoting vital commerce by assuring recovery of wholesale costs incurred under FERC-approved schedules. The subsequent Council Order at issue here traps an additional $135 million in costs and will continue severely to impair NOPSI's ability to finance its operations until the Order is enjoined. *See* Cert. App. 12A-13A. Moreover, the Council entered its Order after having *participated* in the FERC proceedings and having unsuccessfully urged the result that the Council's Order would impose. This is an affront to the federal scheme.

Conversely, a federal injunction would not affect any legitimate state retail ratemaking function. The Council's 1986 Settlement Resolution determined NOPSI's non-Grand Gulf 1 retail revenue requirements, prescribed how NOPSI's Grand Gulf 1 expenses would be phased in, and determined all other rate design issues. This case does not challenge any aspect of that retail rate order. Nor would it interfere with the Council's ability to perform these legitimate state functions in the future. Rather, all NOPSI seeks to enjoin is the subsequent Council Order that disallows $135 million of federally mandated Grand Gulf 1 costs on grounds of "imprudence" and that is thus preempted in its entirety by the Federal Power Act. In short, this is a quintessential case for the exercise of federal equitable jurisdiction.

II. The Doctrine of *Younger* v. *Harris* Does Not Authorize Abstention.

These same considerations establish that abstention cannot be justified under *Younger* v. *Harris*, 401 U.S. 37 (1971), and the numerous cases holding that there are certain conditions in which federal courts cannot enjoin pending state judicial or administrative proceedings.[30] Like *Burford*, *Younger* does not permit abstention merely because a state civil proceeding is pending, and like *Burford*, *Younger* cannot bar federal court adjudication of a substantial claim that the state order is preempted in its entirety by a federal statute. In any event, *Younger* manifestly cannot apply when, as here, it is clear that the state order is "invalid on its face" and is irreparably harming interests protected by a federal statute.

A. *Younger* Rests On An Accommodation Of State And Federal Interests And *Younger* Abstention Is Flatly Improper Where The Only State Interest Is Adjudicatory.

Younger's doctrine of equitable restraint implements the same broad principles of comity and federalism that is the basis for *Burford*: "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not *unduly* interfere with *legitimate* activities of the States." *Younger*, 401 U.S. at 44 (emphasis added). *Younger* thus requires a "balancing" in which "both federal and state interests ha[ve] to be taken into account"

[30] *Younger* bars a federal court from enjoining a pending state judicial or administrative proceeding if (1) the state proceeding implicates important and legitimate state interests; (2) there is an adequate opportunity to raise the federal claim in the state proceeding; and (3) the state proceeding is not brought in bad faith, does not rest on a "patently unlawful" statute incapable of valid application, and presents no other exceptional circumstances requiring federal court intervention. *See, e.g.*, *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423 (1982).

(*Trainor* v. *Hernandez*, 431 U.S. 434, 448 (1977) (Blackmun, J., concurring)), and "there is a sensitivity to the legitimate needs of both State and *National* Government." *Younger*, 401 U.S. at 44 (emphasis added).

Younger and its progeny recognize that judicial comity is a two-way street. Just as it is important that federal courts not encroach upon substantial state interests, it is equally important that federal courts fulfill their responsibilities when the only relevant issues and interests are federal rather than state.

Under these principles, the mere fact that there is an adequate opportunity to raise federal claims in a pending state proceeding cannot justify a federal court's refusal to vindicate federal rights and to protect overriding federal interests. As all the members of this Court have recognized, *Younger*'s doctrine of equitable restraint cannot be invoked unless the state has a "*substantive* interest in the ongoing proceeding, an interest that goes beyond its interest as adjudicator." *Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. at 30 n.2 (Stevens, J., concurring) (emphasis in original).[31] As the Opinion for the Court stated in *Pennzoil*, "our opinion does not hold that *Younger* abstention is always appropriate whenever a civil proceeding is pending in state court." *Id.* at 14 n.12. There is not even a potential *Younger* bar unless the federal court proceeding could interfere with substantive state functions that are "legitimate" (*Trainor* v. *Hernandez*, 431 U.S. at 441) and "important." *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). That requirement is not satisfied by a state's adjudicatory interest in having its state court resolve federal issues.

[31] *Accord Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. at 14 n.12 (Opinion of the Court); *id.* at 19-20 (Brennan, J., and Marshall, J., concurring); *id.* at 27-28 (Blackmun, J., concurring); *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619, 628 (1986); *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. at 432-34; *Trainor* v. *Hernandez*, 431 U.S. 434, 442-44 (1977); *id.* at 453-56 (Brennan, J., dissenting); *Juidice* v. *Vail*, 430 U.S. 327, 335-36 (1977); *id.* at 344-45 (Brennan, J., dissenting).

The threshold requirement that there be an important, legitimate substantive state interest before abstention can be ordered was established in *Younger* itself. There, the plaintiff sought to enjoin a pending state criminal prosecution that was brought in good faith on the ground that the underlying criminal statute was void for vagueness and overbreadth in violation of the First Amendment. The Court recognized that the state had an obvious and legitimate substantive interest in the enforcement of its criminal law—so much so that decades of prior decisions had established that requiring a federal claimant to defend a criminal prosecution does not constitute "irreparable harm" when the prosecution is brought in good faith. *Younger*, 401 U.S. at 45-47, 51-52. Further, the Court independently determined that the state criminal statute was susceptible to an "acceptable narrowing construction" in the state proceeding and that "once this was done, prosecutions could then be brought for conduct occurring before the narrow construction was made, and proper convictions could stand so long as the defendants were not deprived of fair warning." *Id.* at 50.[32]

Younger thus ordered dismissal of the challenge to the pending state criminal prosecution on the ground that a federal injunction would unduly interfere with a state's legitimate activities. *Id.* at 41. At the same time, *Younger* recognized several exceptions to the principle that federal courts should not enjoin state proceedings or orders that further legitimate state interests. First, the Court held that abstention is improper when the state prosecution is brought in bad faith. *See id.* at 48-49; *Dombrowski* v. *Pfister*, 380 U.S. 479, 485-86 (1965). Second, the Court held that abstention may be improper when the state criminal statute is "flagrantly and patently violative of express constitutional provisions in

[32]When the state has a legitimate substantive interest, *Younger* abstention thus "offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests." *Moore* v. *Sims*, 442 U.S. 415, 429-30 (1979).

every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Younger*, 401 U.S. at 53-54 (quoting *Watson* v. *Buck*, 313 U.S. 387, 402 (1941)); *see also Trainor* v. *Hernandez*, 431 U.S. at 447. Finally, the Court recognized that there could be other "exceptional circumstances" that could permit federal equitable intervention. *Younger*, 401 U.S. at 54.

In any case in which an allegation is made that an exception to *Younger* applies, the court must address that claim and independently decide whether abstention is improper. That is, the federal court first decides whether the threshold requirement for the *Younger* exception is met, and if it is, then the federal court decides the federal issue. *See Dombrowski* v. *Pfister*, 380 U.S. at 485-86.

Similarly, this Court's subsequent *Younger* decisions uniformly establish that the Court must independently determine whether the pending state proceeding implicates "important" and "legitimate" state substantive interests before it can abstain under *Younger*. Indeed, *Younger* was thereafter extended to cases seeking to enjoin obscenity regulation,[33] the enforcement of state court judgments through execution or contempt,[34] the prosecution of welfare fraud,[35] child abuse regulation,[36] bar disciplinary proceedings,[37] and the enforcement of antidiscrimination laws[38] *only because* the Court found that the state had important and legitimate substantive interests that it was seeking to vindicate in each such case.

[33]*Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975).

[34]*Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. at 12-14; *Juidice* v. *Vail*, 430 U.S. 327 (1977).

[35]*Trainor* v. *Hernandez*, 431 U.S. 434 (1977).

[36]*Moore* v. *Sims*, 442 U.S. 415 (1979).

[37]*Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. at 432-34.

[38]*Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986).

The Court's decisions equally establish that *Younger* cannot bar a federal court adjudication when, as here, the federal claim is that the state's jurisdiction to conduct the proceeding is ousted by federal law and that the state, therefore, may have no "legitimate" or "important" substantive interest. These principles apply with special force here, moreover, because the Council's Order is so clearly invalid and is irreparably harming protected federal interests.

B. *Younger* Cannot Apply When There Is A Substantial Claim That The Challenged State Proceedings Are Preempted By Federal Law In Their Entirety And There Is No State Law Issue.

Absent other considerations, *Younger* cannot prevent a federal court from adjudicating a well-pleaded claim that a federal law has preempted state jurisdiction over a subject matter, and deprived the state of any legitimate substantive interest to conduct the pending proceeding. Indeed, because *Younger* abstention depends on a holding that the state's substantive interest is "legitimate" and "important," a decision to abstain here, as in *Burford*, is "an implicit ruling on the merits" "when the plaintiff's claim is based on preemption." *Knudsen Corp.* v. *Nevada State Dairy Comm'n*, 676 F.2d 374, 377 (9th Cir. 1982).

This is the clear teaching of the Court's holdings that federal claimants cannot be required to exhaust state administrative and judicial remedies when they have presented valid claims that state utility proceedings or orders are preempted by a federal statute. *See* pp. 24-25, *supra*. Indeed, the Court has upheld injunctions against state proceedings that are merely investigating the wholesale energy transactions committed to FERC's exclusive jurisdiction. *Public Utilities Comm'n of Ohio* v. *United Fuel Gas Co.*, 317 U.S. 456 (1943).

Moreover, the correctness of the Ninth Circuit's statement that a federal court cannot abstain without deciding the merits of such

threshold challenges to state jurisdiction is made explicit in *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986). There, a sectarian school had sought to enjoin a state civil rights commission from either (1) investigating the school's decision to terminate a teacher, or (2) imposing any sanctions at the conclusion of the pending investigation. The court of appeals had ordered the entry of the injunction on the ground that the pending investigation violated the Religion Clauses of the First Amendment. This Court reversed and ordered the dismissal of the suit on *Younger* grounds.

However, the Court so held *only after* it decided the threshold constitutional challenge to the state's jurisdiction to investigate the school and rejected that federal claim on the merits. The Court held that "the Commission violates no constitutional rights by merely investigating the circumstances of [the] discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge." *Id.* at 628. In short, the Court recognized that *Younger* abstention could not be ordered without first determining that the state had a substantive interest in investigating the school that was not "preempted" by federal law, and that was therefore "legitimate."[39] *See* P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 1435 (3d Ed. 1988).

For these reasons, the majority of federal courts of appeals that have considered the issue have concluded that federal courts may not refuse to adjudicate substantial claims that the state's regulatory jurisdiction has been preempted by a federal statute. They hold that the pendency of state proceedings alone cannot bar a federal district court from adjudicating federal preemption claims

[39] *Dayton* thus required the District Court to rule on NOPSI's preemption claim before it could even consider abstaining. Because *MP&L* squarely held that the state "interest" in conducting such a prudence inquiry is preempted (108 S. Ct. at 2439, slip op. at 16-17), *Dayton* and *MP&L* foreclosed abstention under *Younger* here.

that go to the "power of the state administrative agency to proceed at all" and that "no deference is due state proceedings which would entrench on the exclusive federal domain." *Baggett* v. *Department of Professional Regulation*, 717 F.2d 521, 524 (11th Cir. 1983).

Specifically, the courts of appeals reason that the "legitimate state interest contemplated by *Younger*. . . does not exist when the state action has been preempted or foreclosed" by a federal statute. *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n*, 772 F.2d 404, 417 (8th Cir. 1985) (citation omitted). The "notion of 'comity' embodied by the *Younger* doctrine is 'not strained when a federal court cuts off state proceedings that entrench upon the federal domain.' " *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n*, 791 F.2d 1111, 1117 (3rd Cir. 1986) (citations omitted); *accord Appalachian Power Co.* v. *Public Service Comm'n of West Virginia*, 614 F.Supp. 64, 70-71 (S.D. W. Va.), *aff'd*, 770 F.2d 159 (4th Cir. 1985); *see also Champion Int'l Corp.* v. *Brown*, 731 F.2d 1406, 1409 (9th Cir. 1984).

These principles do not establish that abstention is never appropriate when a federal preemption claim is raised. Abstention may still be warranted when decision of the federal question is " 'dependent upon, or may be materially altered by, an uncertain question of state law.' " *Cf. Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. 498, 511-12 (1972) (citation omitted); *Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. at 29 (Blackmun, J., concurring). But there is no such state law claim here. Similarly, abstention may also be warranted when the federal preemption claim is germane to some but not all issues in the pending state proceeding, and the federal court would be deciding individual issues on a "piecemeal" basis. *Cf. Moore* v. *Sims*, 442 U.S. at 426-27 n.10; *Trainor* v. *Hernandez*, 434 U.S. at 445. But here the federal preemption claim is dispositive of the entire state controversy. In short, there is no question but that the controlling principles barred *Younger* abstention in this case.

C. *Younger* Abstention Cannot Be Ordered When The Invalidity Of The State Proceeding And Order Is Clear On Its Face.

The foregoing discussion establishes that a federal court cannot refuse to adjudicate a substantial federal preemption claim that is dispositive of the entire state proceeding simply because the issue can be presented in the pending state proceedings. There is, moreover, an even narrower ground for decision in this case. As respondents concede,[40] *Younger* establishes that federal courts may not abstain from deciding a challenge to a state proceeding or order that is invalid on its face.[41] And the Council's Order of February 4, 1988 is facially invalid under this Court's holding in *MP&L*. *Accord Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986). Indeed, because the Council unsuccessfully urged that its proposed prudence disallowance was permitted by federal law in its *amicus* filings in *MP&L*, it is extraordinary that the Council would contend otherwise.

In *MP&L*, as here, a prudence review of MP&L's Grand Gulf expenses was ordered for the sole purpose of determining "whether the costs FERC had directed MP&L to pay for its allocation of Grand Gulf should be 'trapped' or passed on to . . . retail customers." *MP&L*, 108 S. Ct. at 2439 n.12, slip op. at 17 n.12; *compare* p. 8, *supra*. *MP&L* held that the earlier decision in

[40]Council Cert. Opp., pp. 13, 18-19, 25-27.

[41]There is an exception to the principles of *Younger* if a state statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Younger*, 401 U.S. at 53-54 (citations omitted). This is a standard that can seldom be satisfied when the claim is that a statute violates the Federal Constitution, for there are few instances in which a constitutional provision bars any and all state regulation of a subject matter. However, when a federal statute gives a federal agency exclusive jurisdiction over a subject matter and ousts any preexisting state authority, this standard is plainly satisfied. *See, e.g., Public Utilities Comm'n of Ohio* v. *United Fuel Gas Co.*, 317 U.S. 456 (1943).

Nantahala established that states have no jurisdiction to investigate the "prudence" of costs incurred under FERC rate schedules, but must treat the FERC-mandated expenses as "fair and reasonable when determining retail rates" and "may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates." *MP&L*, 108 S. Ct. at 2439, slip op. at 16-17. The Council's Order does precisely what *MP&L* forbids.

The Council's attempt to distinguish *MP&L* would be frivolous even if the Council's arguments had not been presented to the Court in *MP&L* itself. In *MP&L*, the Mississippi Attorney General had contended that Grand Gulf 1 should be paid for by shareholders because he alleged that this power is "excessively priced" and that it was thus imprudent for MP&L to acquire Grand Gulf 1 power for resale to retail customers. The Council's prudence disallowance rests on the same ground.[42] The only difference is that the Council purports to challenge not NOPSI's initial acquisition of the Grand Gulf 1 power, but rather NOPSI's retention of that power to serve its retail ratepayers.

But this is a distinction without a difference. A $135 million penalty could not be imposed on NOPSI for failing to avoid its Grand Gulf allocation unless the allocation was itself unreasonable. This Court held in *MP&L* that a prudence disallowance could not be based on such grounds:

> "But if the integrity of FERC regulation is to be preserved, it obviously cannot be unreasonable for MP&L to procure the particular quantity of high-priced Grand Gulf power that FERC has ordered it to pay for."

MP&L, 108 S. Ct. at 2440, slip op. at 19. Obviously, if it is reasonable to procure the power, it cannot be unreasonable to retain it.

[42]Council Cert. Opp., p. 8 n.5.

Further, the Council goes on to find that NOPSI could have avoided excessively priced or otherwise uneconomic power by (1) selling all but 9% of Grand Gulf 1's capacity to another utility at the very price contended to be "excessive" and "otherwise uneconomic," and (2) buying equivalent amounts of capacity at the hypothetically lower cost of coal-fired power. As the lower courts found, the Council's "logic" is "mystif[ying]," because not even a "sucker" would purchase more expensive Grand Gulf capacity if the same quantities of capacity could be purchased at lower prices on the open market. *See* p. 14, *supra*.

However, the decisive fact is that here, too, the Council is not only determining matters within FERC's exclusive jurisdiction, but also making findings that conflict with the very determinations made in FERC's decisions. As *MP&L* and *Nantahala* hold, FERC has exclusive jurisdiction to allocate lower-cost and higher-cost power among the companies in an integrated multistate system and to determine whether and how actual (or hypothetical) wholesale sales and purchases should alter the wholesale costs of any individual company. Thus, FERC alone has jurisdiction to determine whether NOPSI could have made the off-system wholesale sales and purchases of power which the Council's Order hypothesizes in 1980. And FERC alone has jurisdiction to determine whether and how such hypothetical 1980 transactions would have reduced NOPSI's wholesale costs. Further, FERC's findings and determinations foreclose the Council's conclusion that the hypothetical transactions would have reduced NOPSI's wholesale costs by $135 million. *See* pp. 12-13 & n.18, *supra*. Thus, the invalidity of the Council's Order could not be clearer.[43]

[43]The Council's sole response to these points is to argue that its Order has not disturbed the FERC wholesale rates and the underlying obligations, but has "merely" calculated retail rates by assuming a hypothetical reduction of wholesale costs. *See* Council Cert. Opp., p. 26. This contention is foreclosed by *Nantahala* and *MP&L*. Each holds that states cannot circumvent FERC regulation on such grounds. *Nantahala*, 476 U.S. at 955; *MP&L*, 108 S. Ct. at 2438, slip op. at 15.

But the short answer is that the Council unsuccessfully advanced these arguments to the Court in *MP&L* itself. The Council there stated, correctly, that the Mississippi Supreme Court's decision was "unclear as to the nature of the proposed prudence inquiry"[44] and that any Grand Gulf 1 "prudence" disallowances ordered on remand could well have adopted the Council's present theory.[45] The Council argued, at length, that such prudence disallowances are valid. By holding that Mississippi was preempted from conducting *any* prudence investigation and that *all* FERC-mandated costs must be passed through to retail ratepayers, the Court necessarily rejected the Council's current claims. Otherwise, this Court would have permitted the Mississippi prudence inquiry to go forward within the specified limits proposed by the Council in its *amicus* briefs. Thus, the Fifth Circuit assumption that the Council's Order is invalid on its face is correct. *See* Cert. App. 13A.

As the Council concedes, when such facial invalidity exists, there is no possible *Younger* bar to the issuance of federal equitable relief. *See* p. 35 & nn.40-41, *supra*. Indeed, the Court has upheld injunctions against state utility proceedings or orders that conflict on their face with exclusive grants of jurisdiction to federal agencies. *See* pp. 24-25, *supra*. The present case, in short, is a circumstance in which the balance overwhelmingly favors a federal court injunction.

III. In Any Event, It Was Error To Refuse To Entertain The Request For A Preliminary Injunction.

Finally, although NOPSI maintains that the federal court here was required to adjudicate the federal preemption claim on the

[44]Brief of Council of City of New Orleans As Amicus Curiae, *Mississippi Power & Light Co.* v. *Mississippi*, No. 86-1970, p. 10 (filed January 22, 1988).

[45]*Id.*, pp. 14-24; *see also* Brief of Council of City of New Orleans As Amicus Curiae, *Mississippi Power & Light Co.* v. *Mississippi*, No. 86-1970, pp. 13-15 & n.10 (filed August 10, 1987).

merits and issue permanent equitable relief, NOPSI submits that, in any event, it was reversible error for the Fifth Circuit to abstain from deciding NOPSI's request for a preliminary injunction. As the Fifth Circuit recognized, the Council's Order has caused immeasurable harm to NOPSI's protected federal interests and frustrated federal policy from the date the order was issued. *See* Cert. App. 9A.

Federal courts, at a minimum, must grant the interim relief required to protect overriding federal interests while the state proceedings are pending. Courts have endorsed the use of preliminary injunctions to prevent irreparable harm to federal interests in a host of analogous cases in the past. *See Babbitt* v. *United Farm Workers*, 442 U.S. 289, 312 n.18 (1979); *Romany* v. *Colegio de Abogados de Puerto Rico*, 742 F.2d 32, 45 n.13 (1st Cir. 1984); *Spartacus, Inc.* v. *Borough of McKees Rocks*, 694 F.2d 947, 949 & n.3 (3d Cir. 1982); *Catrone* v. *Massachusetts State Racing Comm'n*, 535 F.2d 669, 672 (1st Cir. 1976).[46]

[46]*See also* P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's the Federal Courts and the Federal System* 1375, 1422-23 (3d ed. 1988); Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 Sup. Ct. Rev. 193, 277-78; Wells, *Preliminary Injunctions and Abstention: Some Problems in Federalism*, 63 Cornell L. Rev. 65 (1977).

CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

HERSCHEL L. ABBOTT, JR.
DAVID G. RADLAUER
EDWARD H. BERGIN
R. LEWIS MCHENRY
JONES, WALKER, WAECHTER
POITEVENT, CARRERE &
DENEGRE
201 St. Charles Avenue
New Orleans, LA 70170
(504) 582-8000

REX E. LEE*
DAVID W. CARPENTER
JAMES A. HUTTENHOWER
MARK A. KERBER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

THOMAS O. LIND
Vice President-Regulatory
Counsel
New Orleans Public Service
Inc.
317 Baronne Street
New Orleans, LA 70112
(504) 595-2218

Attorneys for Petitioner

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*Counsel of Record